83 - 2032

No.

FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ELLIOTT SCHULDER
Assistant to the Solicitor General
JAMES A. HUNOLT
Attorney
Department of Justice
Washington D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254(a)(1) because the alien has acquired the necessary seven years' "continuous physical presence" only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 720 F.2d 529. The initial opinion of the court of appeals (App., *infra*, 16a-20a) is reported at 673 F.2d 225. The opinions of the Board of Immigration Appeals (App., *infra*, 11a-15a, 21a-24a) and the decision of the immigration judge (App., *infra*, 25a-30a), are not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a) was entered on November 9, 1983. A petition for

rehearing was denied on January 13, 1984 (App., *infra*, 32a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

8 U.S.C. 1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of Mexico. Bernardo Rios-Pineda unlawfully entered the United States in the summer of 1972 (App., *infra*, 17a). In early 1974, he returned to Mexico under threat of deportation (*id.* at 12a, 17a, 27a). Two months later, on May 1, 1974, respondents entered the United States without inspection, contrary to 8 U.S.C. 1251(a)(2) (App., *infra*, 2a, 12a, 17a, 25a-26a). Respondents effected this entry with the assistance of an alien smuggler, whom they paid about $450 for his services (*id.* at 27a-28a).

Subsequently, Mr. Rios-Pineda was apprehended by officers of the Immigration and Naturalization Service (INS) and was granted permission to return voluntarily to Mexico in lieu of deportation (App., *infra*, 28a). Although given at least two extensions of time to depart, Mr. Rios-Pineda did not do so *(ibid.)*. The INS thereupon instituted deportation proceedings against both respondents in October 1978 (*id.* at 25a-26a; R. 112-113).[1]

At a deportation hearing in December 1978, respondents, through counsel, conceded deportability and orally requested relief from deportation, alleging that they had one citizen child and were expecting a second child, that Mr. Rios-Pineda was presently employed and that an application for labor certification had been filed on his behalf (App., *infra*, 26a-27a; R. 85-86, 87). The immigration judge treated this request as an application for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1) and denied the application. The judge ruled that Mr. Rios-Pineda was ineligible for suspension of deportation because he had not attained the required seven years' "continuous physical presence" (App., *infra*, 27a, 29a). The judge noted that Mr. Rios-Pineda had initially entered the United States in the summer of 1972 and thus had not been in the United

[1] "R." refers to the certified administrative record.

States for seven years at the time of the December 1978 deportation hearing. In any event, the judge ruled that Mr. Rios-Pineda's 1974 departure under threat of deportation constituted a break in the period of continuous physical presence.[2]

Respondents took an administrative appeal to the Board of Immigration Appeals, but did not seek review of the denial of their application for suspension of deportation (R. 69-70). The Board of Immigration Appeals dismissed the appeal (App., *infra*, 21a-24a).[3]

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[2] Although the immigration judge expressly addressed only Mr. Rios-Pineda's lack of eligibility for suspension of deportation, the necessary implication of his decision was that Mrs. Rios-Pineda was also ineligible for suspension because she too lacked the requisite seven years' "continuous physical presence."

In addition, the immigration judge denied respondents' application for voluntary departure, pursuant to 8 U.S.C. 1254(e), noting, inter alia, that respondents had used a professional smuggler to enter this country, and that Mr. Rios-Pineda failed to depart voluntarily prior to institution of deportation proceedings and had reentered this country in 1974 only two months after his departure under the threat of deportation (App., *infra*, 29a-30a).

[3] In their appeal to the BIA, respondents claimed that their deportation would result in the unconstitutional de facto deportation of their citizen child. The BIA rejected this claim as without merit (App., *infra*, 22a-23a, citing, *e.g.*, *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5th Cir. 1975); *Faustino* v. *INS*, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971)). Respondents also claimed that they were entitled to relief under 8 U.S.C. 1182(c), which permits relief from exclusion or deportation for "aliens lawfully admitted for permanent residence." The BIA found respondents ineligible for such relief because they had never been admitted as lawful permanent residents (App., *infra*, 23a). Respondents further contended that their privilege against self-incrimination was violated when they responded to the immigration judge's questions at their deportation hearing. The BIA concluded that this contention was insubstantial, noting that respondents, who were represented by counsel at the hearing, did not assert that

2. In July 1980, respondents filed a petition for review in the court of appeals, thus automatically staying their deportation pursuant to 8 U.S.C. 1105a(a)(3). Respondents claimed that their constitutional rights had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing, that their deportation would constitute an unlawful de facto deportation of their two citizen children, and that the immigration judge erred in concluding that Mr. Rios-Pineda had not been physically present in the United States for a continuous period of seven years.[4] Respondents urged the court to "order that [their] deportation * * * be suspended."[5]

In March 1982, the court of appeals reversed the decision of the Board and remanded the case for further proceedings (App., *infra*, 16a-20a). In so doing, the court did not address the merits of any of respondents' claims of error. Instead, it found that respondents had accrued the requisite seven years' "continuous physical presence" while their petition for review was pending, and it concluded that respondents had "'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing'" (*id.* at 19a, quoting *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 459

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their responses to the questions would violate their privilege and that respondents submitted no evidence that their testimony had been compelled (App., *infra*, 24a). Indeed, the BIA observed *(ibid.)* that counsel had freely conceded respondents' deportability and had waived the reading of their rights pursuant to 8 C.F.R. 242.16. Respondents' final argument was that the order to show cause was invalid as to Mr. Rios-Pineda because at the time it was issued an application for labor certification was pending before a state agency. The BIA held that the commencement of deportation proceedings against a deportable alien is a matter within the discretion of the District Director (App., *infra*, 23a).

[4] Brief for Petitioners at 2-3, *Rios-Pineda* v. *U.S. Department of Justice*, No. 80-1619 (8th Cir.).

[5] *Id.* at 4.

(5th Cir. 1981)). The court directed the Board to hold the proceedings in abeyance for 60 days to give respondents an opportunity to file a motion to reopen their deportation proceedings (App., *infra*, 20a). In addition, the court cautioned the Board "to give careful and thorough consideration to the * * * motion to reopen if, indeed, one is filed" (*id.* at 20a n.5). The court stated that if no motion to reopen were filed within 60 days, the Board could dismiss the proceedings (*id.* at 20a).

3. Respondents filed a motion to reopen, accompanied by applications for suspension of deportation. In their motion to reopen, respondents alleged that they had been in the United States for a continuous period of seven years from the time of their entry on May 1, 1974, that they are persons of good moral character, and that deportation would result in extreme hardship to them and their citizen children (R. 17-18). With respect to the latter claim, respondents alleged that their two citizen daughters, then seven and three years of age, would be deprived of their rights to an education in United States schools and to social assistance if respondents were deported. Specifically, respondents claimed that deportation would interrupt the education of their older daughter in United States schools and would require her to attend Mexican schools where classes are conducted in Spanish. Respondents also raised general claims of psychological and economic hardship to themselves arising from "their low skills and educations" and the lower standard of living in Mexico. R. 18.

Contrary to 8 C.F.R. 3.8(a), respondents submitted no affidavits or other evidentiary materials that specifically addressed these allegations of hardship. The only materials attached to the motion to reopen were respondents' applications for suspension of deportation, copies of respondents' income tax returns, a purchase agreement for a house, a letter showing that Mr. Rios-Pineda was employed, a school record relating to respondents' older child, and birth and marriage records

(R. 20-41). Apart from their allegations of hardship, respondents pointed to certain language in the court of appeals' decision which, they asserted, showed that the court had already accepted their extreme hardship claim (R. 19).[6]

The BIA denied respondents' motion to reopen (App., *infra*, 11a-15a). It held that respondents failed to make a prima facie showing of extreme hardship necessary to establish eligibility for suspension of deportation (*id.* at 13a-14a). The Board noted that respondents had submitted no affidavits in support of their extreme hardship claim (*id.* at 13a). It examined "the documents and the vague allegations forwarded by counsel" and concluded that they were not sufficient to establish a prima facie showing of extreme hardship (*id.* at 13a-14a).

In addition, the Board concluded that the motion to reopen should in any event be denied in the exercise of its discretion (App., *infra*, 14a-15a). The BIA observed, in this regard, that respondents were able to acquire seven years' presence and the equity of a second child only by pursuing what it considered to be frivolous appeals, and it concluded that denial of a motion to reopen is appropriate where statutory eligibility for relief is acquired only by means of such dilatory tactics (*id.* at 14a). The BIA also noted that respondents entered the United States in May 1974 with the assistance of a paid smuggler and that on that occasion Mr. Rios-Pineda was returning within only two months of a

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[6] The portion of the court of appeals' opinion relied on by respondents stated (App., *infra*, 19a):

> Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

forced departure after he had failed to depart voluntarily (*id.* at 14a-15a). Concluding that these adverse factors outweighed the equities in respondents' favor, the BIA denied the motion to reopen as a matter of discretion (*id.* at 15a).

4. The court of appeals again reversed and remanded (App., *infra*, 1a-10a). The court concluded that it had implicitly decided respondents' extreme hardship claim in their favor in its earlier decision and that this determination was binding on the Board as the "law of the case" (App. *infra*, 5a-7a). The court reviewed the factors supporting its earlier "holding" that respondents had established a prima facie case of extreme hardship and concluded that that holding was not clearly erroneous (*id.* at 7a).[7]

In the alternative, the court of appeals ruled that even if respondents' prima facie eligibility for suspension of deportation had not been decided by the court in its prior opinion, the Board abused its discretion in declining to find that respondents had made a sufficient showing of extreme hardship to warrant reopening of their deportation proceedings (App., *infra*, 7a-8a n.3). The court pointed out that Mr. Rios-Pineda had claimed his mother, a resident of Mexico, as a dependent on his federal income tax returns and that the Board had never considered the hardship to respondents that deportation might entail with respect to respondents' ability to continue supporting Mr. Rios-Pineda's mother (*id.* at 7a n.3). Furthermore, the court stated that the Board failed to consider the possibility that respondents' citizen children only speak English, thus increasing the educational and social hardship if they are forced to go to Mexico with their parents (*id.* at 8a n.3).[8]

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[7] These factors were that Mr. Rios-Pineda had been regularly employed since 1974, that respondents had made a substantial down payment on a home, and that their citizen children had lived in the United States since birth (App., *infra*, 7a).

[8] The court of appeals failed to mention that respondents' motion to reopen did not refer to respondents' obligation to support Mr. Rios-Pineda's mother and did not allege that respondents' daughters only speak English.

The court of appeals also held that the BIA's discretionary denial of respondents' motion to reopen was based on improper factors (App., *infra*, 8a-9a). The court disagreed with the BIA's characterization of respondents' appeals as "frivolous," noting that the court had "twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the [respondents'] claim of their right to stay in this country" (*id.* at 9a). In addition, the court concluded that the Board erred in relying on respondents' "disregard" of the immigration laws, as manifested by their use of a paid smuggler and by Mr. Rios-Pineda's repeated refusal to depart voluntarily, because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (*ibid*).

REASONS FOR GRANTING THE PETITION

Since respondents' entry with the assistance of a professional smuggler in 1974, they have never lawfully been in the United States. After Mr. Rios-Pineda's apprehension, the INS granted him ample opportunity to return voluntarily to Mexico in lieu of deportation, but he failed to depart. At their deportation hearing in December 1978, both respondents conceded deportability and were ordered deported. Respondents succeeded in avoiding deportation, however, by seeking discretionary relief from deportation despite their ineligibility for such relief and by filing frivolous appeals. By these dilatory tactics, respondents managed to satisfy the seven-year eligibility requirement for suspension of deportation.

The court of appeals has concluded that the Attorney General may not exercise his discretion to deny respondents' motion to reopen based on their resort to dilatory tactics and their blatant disregard of the immigra-

tion laws. The decision below means that for respondents and other deportable aliens, the use of administrative and judicial review procedures for purposes of delay not only will be condoned, but will in fact be rewarded.

This case thus presents an important question concerning the nature and scope of the Attorney General's authority to deny a deportable alien's motion to reopen deportation proceedings as a matter of administrative discretion, without regard to whether the alien has established a prima facie case of eligibility for the ultimate relief sought. This Court has held that the Attorney General and his delegates may exercise their discretion to deny an alien's request for extraordinary relief regardless of eligibility. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976). In addition, the Court has adverted, in recent cases, to the broad discretion enjoyed by the Attorney General and his delegates in deciding whether to grant or deny a motion to reopen. *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6; *INS* v. *Wang*, 450 U.S. 139, 143-144 n.5 (1981). The decision of the court of appeals, unless overturned, would severely restrict that broad discretion with respect to the thousands of motions to reopen filed each year by deportable aliens.

1. Both the ultimate relief requested by respondents (suspension of deportation) and the procedure by which they are attempting to obtain that relief (a motion to reopen deportation proceedings) are designed to deal with the extraordinary situation.

In order to be eligible for suspension of deportation, an alien must have been physically present in the United States for a continuous period of seven years, must have been a person of good moral charcter during that time, and must be able to show that his deportation would cause "extreme hardship" to himself or to his spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1). The "extreme hardship" and

"continuous physical presence" requirements both reflect the exceptional nature of the suspension remedy. See *INS* v. *Wang*, 450 U.S. at 145; *INS* v. *Phinpathya*, slip op. 7. If an alien meets all three eligibility requirements, the Attorney General must then decide whether suspension relief is warranted in the exercise of his "unfettered discretion." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). See *Kimm* v. *Rosenberg*, 363 U.S. 405, 408 (1960). The Attorney General need not even decide whether an alien has satisfied the statutory eligibility requirements, however, where he determines that the alien's application would be denied as a matter of discretion. See *INS* v. *Bagamasbad*, *supra*; *LeBlanc* v. *INS*, 715 F.2d 685, 688-692 (1st Cir. 1983); *Moore* v. *INS*, 715 F.2d 13, 16 n.2 (1st Cir. 1983).

As this Court observed in *INS* v. *Wang*, 450 U.S. at 140-141, the Immigration and Nationality Act does not expressly provide a vehicle for reopening deportation proceedings after a final order of deportation has been issued. The INS, however, has provided by regulation for such a procedure. 8 C.F.R. 3.2, 3.8.[9] The regulations permit the BIA to reevaluate its prior disposition of cases in which significant developments have occurred subsequent to the hearings and decisions therein. This Court in *Wang* addressed the nature of the BIA's dis-

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[9] 8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

In addition, 8 C.F.R. 3.8(a) provides that the motion to reopen shall "state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material."

cretionary authority over motions to reopen. The Court stated (450 U.S. at 143-144 n.5):

> The present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened. See *Villena* v. *INS*, 622 F.2d 1352 (CA9 1980) (en banc) (Wallace, J., dissenting). In his dissent, Judge Wallace stated that INS had discretion beyond requiring proof of a prima facie case:
>
> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations." *Id.*, at 1362.

More recently, in *INS* v. *Phinpathya*, *supra*, the Court had occasion to discuss the broad discretion of the BIA with respect to motions to reopen. The issue before the Court in *Phinpathya* was whether the alien's three-month trip abroad in 1974 had broken the continuity of her physical presence in this country, thus rendering her ineligible for suspension of deportation under 8 U.S.C. 1254(a)(1). The alien argued that the case was moot because, since her return to this country in 1974, she had been physically present in the United States for a continuous period of seven years. This Court rejected the mootness argument, noting that although the alien had filed a motion with the BIA to reopen her deportation proceeding, "granting of the motion is entirely within BIA's discretion." *INS* v. *Phinpathya*, slip op. 5 n.6.

Both *Wang* and *Phinpathya* make clear that the Attorney General and his delegates may exercise discretion to deny a motion to reopen "beyond requiring proof of a prima facie case" (*Wang*, 450 U.S. at 144 n.5). The decision below greatly restricts that discretionary authority.

2. The court of appeals assumed that the BIA retains discretion to deny motions to reopen regardless of whether the alien has established a prima facie case of eligibility for suspension of deportation (App., *infra*, 8a). The court concluded, however, that the factors considered by the BIA in exercising its discretion in this case were "improper and irrelevant" (*id.* at 9a).

a. The court of appeals rejected the BIA's conclusion that respondents had satisfied the seven year "continuous physical presence" requirement of 8 U.S.C. 1254(a)(1) only by filing "frivolous appeals" (App., *infra*, 9a). But the lack of substantive merit in respondents' ongoing litigation is readily apparent. Respondents did not raise the suspension of deportation issue in their administrative appeal to the BIA (no doubt because they had not yet satisfied the continuous physical presence requirement), and the claims they did raise, which were patently insubstantial, were rejected out of hand by the BIA (App., *infra*, 21a-24a). See note 3, *supra*. In their initial petition for review in the court of appeals, respondents raised some of the same arguments that had been rejected by the BIA.[10] In addition,

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[10] Respondents contended that their privilege against self-incrimination had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing. Respondents made no claim that they were in custody, and they presented no evidence that their responses to the judge's questions were compelled. Moreover, as the BIA observed in rejecting this claim (App., *infra*, 24a), respondents were represented at the hearing by counsel who

respondents claimed eligibility for suspension of deportation, even though at the time they still had not accrued the requisite seven years' physical presence necessary for that relief.[11] The court of appeals addressed none of the issues raised by respondents. Instead, the court found that respondents had acquired seven years' presence while their appeal was pending, and it accordingly remanded the case to the Board to permit respondents to seek reopening of their deportation proceedings in order to apply for suspension of deportation (App., *infra*, 20a & n.5).

In rejecting the notion that respondents had pursued frivolous appeals, the court of appeals reasoned that the appeals could not have been frivolous because the court itself had granted relief (App., *infra*, 9a). But the relief that the court granted to respondents resulted solely from respondents' ability to delay their deportation by filing appeals lacking substantive merit.[12] The net ef-

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conceded their deportability and waived the reading of their rights. Respondents' claim that their deportation would result in the unconstitutional deportation of their citizen children was correctly dismissed by the BIA as patently without merit (*id.* at 22a-23a). Finally, respondents' argument that the immigration judge erred in concluding that Mr. Rios-Pineda had failed to show seven years' "continuous physical presence" was frivolous on its face.

[11] Respondents' brief in the court of appeals was filed on November 29, 1980, less than seven years after their May 1974 entry.

[12] In concluding that respondents' initial petition for review was not frivolous, the court of appeals may have been adverting to its ruling, in another portion of the decision below (App., *infra*, 5a-7a), that in its first decision remanding the case to the BIA to consider respondents' motion to reopen, the court in fact held that respondents had made a prima facie showing of eligibility for suspension of deportation. We seriously doubt whether the court's initial decision may be so construed, since the court merely directed the Board to consider respondents' motion to reopen if one was filed (*id.* at 20a & n.5). Indeed, the court itself noted the "ambiguity" of its earlier decision (*id.* at

fect of the court's ruling is that any litigation that buys sufficient time to accrue seven years' physical presence cannot be considered frivolous. In substance, then, the court has held that delay is a valid purpose for pursuing administrative and judicial review. This decision conflicts with the decisions of numerous courts of appeals holding that the Attorney General may properly consider an alien's resort to dilatory tactics in denying a

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6a n.2). (Because of that "ambiguity," the INS cannot be faulted (as the court below sought to do) for not challenging the court's initial decision. See *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212 (1952)). In any event, it was only due to the passage of time resulting from respondents' frivolous appeals that the court could possibly have concluded that respondents met the seven years' presence requirement.

Beyond this, it is clear that the court of appeals had no authority to find, in the first instance, that respondents had established prima facie eligibility for suspension of deportation relief. Prior to the court of appeals' initial decision, neither the BIA nor the immigration judge considered whether respondents had made a prima facie showing of extreme hardship. The immigration judge denied suspension of deportation solely because Mr. Rios-Pineda had not met the threshold requirement of seven years' "continuous physical presence;" accordingly, there was no reason for the judge to address whether Mr. Rios-Pineda had satisfied either the "good moral character" or the "extreme hardship" requirements of the statute. Respondents did not pursue their application for suspension of deportation before the BIA; as a result, the BIA had no occasion even to consider respondents' eligibility for suspension of deportation.

Thus, to the extent that the court of appeals' initial decision may be construed as embodying a "holding" for respondents on the "extreme hardship" question, the court was entirely without authority to issue such a "holding." If the court in fact intended to determine respondents' prima facie eligibility for suspension of deportation, "it usurped an administrative function." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). It therefore follows that the court below could not properly rely on its earlier "holding" as support for the proposition that respondents' prior appeals were not frivolous.

motion to reopen deportation proceedings as a matter of administrative discretion. See, *e.g.*, *LeBlanc* v. *INS*, 715 F.2d at 693; *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Muigai* v. *INS*, 682 F.2d 334, 337 (2d Cir. 1982); *Men Keng Chang* v. *Jiugni*, 669 F.2d 275, 278 (5th Cir. 1982); *Pang Kiu Fung* v. *INS*, 663 F.2d 417, 419 (2d Cir. 1981); *Hibbert* v. *INS*, 554 F.2d 17, 21 (2d Cir. 1977); *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

b. In denying respondents' motion to reopen as a matter of discretion, the BIA also took into account respondents' repeated disregard for this Nation's immigration laws, as reflected by their use of a paid smuggler when entering this country illegally and their abuse of the privilege of voluntary departure. The court of appeals cavalierly concluded that the Board's consideration of this factor was arbitrary and irrational because disregard of the immigration laws is present in most deportation proceedings (App., *infra*, 9a). But the fact that all deportable aliens have violated the immigration laws to some extent does not mean that the BIA in exercising discretion may not differentiate among such aliens on the basis of the degree to which they have flouted the immigration process. Indeed, other courts have expressly recognized the BIA's authority to consider an alien's adverse immigration history in ruling on a motion to reopen. See, *e.g.*, *LeBlanc* v. *INS*, 715 F.2d at 693; *Agustin* v. *INS*, 700 F.2d at 566; *Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1212 (9th Cir. 1983).

This Court concluded in *Wang* (450 U.S. at 143-144 n.5) that the Attorney General has broad discretion to deny a motion to reopen. If this discretion means anything, it must mean that the Attorney General may deny reopening where it is undisputed that the alien movant has engaged in actions that repeatedly manifest contempt for the immigration laws. This is particularly true where the motion to reopen is for the purpose of seeking the ultimate relief of suspension of deportation,

which is itself discretionary and which Congress designed as an exceptional remedy to be granted to only a limited number of aliens. See *INS* v. *Wang*, 450 U.S. at 145; *INS* v. *Phinpathya*, slip op. 7.

3. The court of appeals' decision restricting the Attorney General's discretionary authority to deny motions to reopen deportation proceedings will have severe adverse effects on the administration of the immigration laws. Motions to reopen are not limited to cases involving applications for suspension of deportation; rather, a motion to reopen may be filed in virtually every deportation case.[13] Such procedural devices are often used to frustrate deportation and prolong an alien's illegal stay in this country. See, *e.g.*, *Oum* v. *INS*, 613 F.2d 51, 52-54 (4th Cir. 1980); *Hibbert* v. *INS*, 544 F.2d at 21; *Schieber* v. *INS*, 520 F.2d 44 (D.C. Cir. 1975).

By disabling the Attorney General from denying relief as a matter of discretion to aliens who have used dilatory tactics in an effort to satisfy the eligibility criteria for suspension of deportation, the decision below will inevitably encourage aliens to file frivolous motions and appeals. Moreover, by restricting the Attorney General's discretion to sift out from the many motions to reopen only those that appear to have a reasonable likelihood of success, the decision below will impose a substantial burden on the administrative agency to reopen deportation proceedings in order to hold hearings

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[13] The Executive Office of Immigration Review in the Department of Justice advises us that approximately 3,000 motions to reopen were considered by immigration judges during the year ending in April 1984. During 1983, the Board of Immigration Appeals adjudicated approximately 450 motions to reopen deportation proceedings. (A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5 and 242.22. However, where, as here, the order of deportation has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2 and 3.8.)

on, and review the merits of, numerous requests for discretionary relief.

In short, this case reveals the need to reaffirm the BIA's "'right to be restrictive'" (*INS* v. *Wang*, 450 U.S. at 144 n.5, quoting *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting)) in exercising its discretionary authority over immigration matters. It is inconceivable to us that Congress, in enacting the suspension of deportation statute, and the Attorney General, in promulgating the regulations concerning motions to reopen, meant to preclude the immigration authorities from considering an alien's prolonged and willful abuse of the immigration process itself as a basis for denying the alien's request for discretionary relief.[14]

[14] We note that if the court of appeals had upheld the BIA's reasonable exercise of discretion in denying the motion to reopen, the court would have had no occasion to reach the erroneous conclusion that respondents had made a prima facie showing of eligibility for suspension of deportation. The latter ruling is manifestly incorrect.

First, the court's reliance on the "law of the case" doctrine is misplaced because, as we have already pointed out (see note 12, *supra*), if the court in its initial decision in fact held that respondents made out a prima facie case, it acted outside the scope of its authority by usurping the administrative function of the immigration authorities in passing on applications for suspension of deportation.

Second, the court's alternative holding, that respondents established prima facie eligibility in their motion to reopen, is directly contrary to this Court's holding in *INS* v. *Wang*, *supra*. Here, as in *Wang*, the motion to reopen was not accompanied by affidavits or evidentiary materials specifically addressed to the "extreme hardship" claims, as required by the applicable regulations (8 C.F.R. 3.2 and 3.8(a)). Compare App., *infra*, 13a, with 450 U.S. at 143. Moreover, in both this case and *Wang*, the court "improvidently encroached" on the authority of the Attorney General and his delegates "to construe 'extreme hardship' narrowly." *Id.* at 144, 145. The vague and conclusory allegations of hardship in this case are virtually identical to those in *Wang*. Compare App., *infra*, 13a-14a, with 450 U.S. at 144-145. Indeed, the decision below is even more egregious than the lower court decision that the Court reversed in *Wang*. Here, the court found that the BIA erred in failing to consider certain hardship factors that the court itself gleaned from the various documents submitted by respondents (App., *infra*, 7a-8a n.3). The court faulted the Board in this regard even though respondents themselves did not even cite these factors in their motion to reopen. See page 8 and note 8, *supra*.

Although we believe that the decision below is clearly contrary to *Wang* on the prima facie eligibility issue, we have not presented this point as a separate question in this petition because reversal of the decision of the discretion issue would render the prima facie issue essentially moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JAMES A. HUNOLT
Attorney

JUNE 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1894

BERNARDO RIOS/PINEDA AND
ESTARNILADA RIOS/PINEDA DE RIOS, PETITIONERS,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENT

Submitted: March 16, 1983
Filed: Nov. 9, 1983

ON PETITION FOR REVIEW OF ORDER OF IMMIGRATION AND NATURALIZATION SERVICE

Before HEANEY and FAGG, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

This case is before us for a second time. The petitioners are Bernardo Rios-Pineda and his wife, Estarnilada Ramos de Rios. We are asked in this petition to review the July 16, 1982, decision of the Board of Immigration Appeals denying the petitioners' motion to reopen de-

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* The HONORABLE WILLIAM C. HANSON, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

portation proceedings against them. We do not consider the instant petition in a vacuum. We are aware, as were both parties at oral argument in March of this year, of recent legislative action which would render it moot. Specifically, proposals to reform our federal immigration laws, backed by the present executive administration and twice passed by the United States Senate, would grant amnesty from deportation to millions of immigrants presently within our borders. *See* 129 Cong. Rec. S6905-S6987 (daily ed. May 18, 1983) (consideration and passage of S. 529, 98th Cong., 1st Sess. (1983)). The petitioners would be beneficiaries of this much-awaited legislation. Because it is increasingly apparent that the House of Representatives will not act on these proposals this year, however, we have no choice but to decide this case based on an immigration policy embodied in laws passed in substance over two decades ago.

Bernardo Rios-Pineda entered this country for the first time in the summer of 1972. He returned to Mexico for approximately two months in 1974. On May 1, 1974, he and his wife entered the United States without inspection at San Ysidro, California, and soon made their way to Omaha, Nebraska. Bernardo has worked at Union Packing Company in Omaha since 1974. The petitioners have two daughters born in Omaha as United States citizens: Ana Belia, who is now nine years of age; and Brenda Lee, who is four years old.

The Immigration and Naturalization Service (INS) issued orders to show cause why the petitioners should not be deported in October of 1978. After a deportation hearing on December 12, 1978, an immigration judge denied, *inter alia*, Bernardo's application for suspension of deportation under 8 U.S.C. § 1254(a)(1) (1982) (as amended). Section 1254(a)(1) provides that the Attorney General may suspend the deportation of a per-

son not lawfully admitted into the country if that person

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

Id.

The immigration judge—acting for the Attorney General's delegate, the INS—denied Bernardo's application under this section solely because he failed to meet the seven-year continuous presence requirement. The Board of Immigration Appeals (Board) dismissed the petitioners' appeal from this decision on May 30, 1980.

We reviewed the Board's May 30, 1980, dismissal in our first opinion on this case, *Rios-Pineda* v. *United States Department of Justice*, 673 F.2d 225 (8th Cir. 1982). In that opinion, we noted that both Bernardo and Estarnilada met the seven-year continuous presence requirement while the petition for review was under consideration by our Court. Citing *Vargas-Gonzalez* v. *INS*, 647 F.2d 457 (5th Cir. 1981), and outlining the petitioners' employment and family situation, we concluded "that Bernardo and Estarnilada * * * have 'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing.'" *Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 227. Accordingly, we reversed the Board's decision and granted the petitioners sixty days in which to file a "motion to reopen" their deportation proceedings, at which time the Board was directed to "promptly consider and rule upon their claim that

they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1)." *Id.* at 228 (footnote omitted).

On July 16, 1982, the Board denied the petitioners' motion to reopen after remand from this Court. First, the Board declared that it would deny the motion, regardless of its merit, because it had been filed in an untimely and improper manner. *See* 8 C.F.R. §§ 3.2, 3.8 (1983). Second, assuming that the motion were properly filed, the Board held that the petitioners, by exhibits filed and allegations made in that motion, failed to make a "prima facie showing of extreme hardship to establish eligibility for suspension of deportation." Finally, the Board held that the motion should alternatively be denied in the exercise of discretion because the petitioners "acquired their 7 years of physical presence and the additional factor of their second child" by filing "frivolous appeals," and because they showed "disregard for our immigration laws by paying a smuggler to help them avoid inspection [in 1974] and by failing to depart voluntarily."

On petition for review of the Board's July 16, 1982, decision, Bernardo and Estarnilada contend that the Board abused its discretion in summarily denying their motion to reopen. They assert that the motion and supporting exhibits were filed with the Board within the time constraints set out in our earlier opinion. They also contend that, given that opinion, their motion, and the filed exhibits, the Board erred in finding that they had failed to establish a prima facie case of extreme hardship. Finally, they assert that the discretionary reasons given by the Board for denying them any relief were improper. Because of the unique course of proceedings in this case, we agree with the petitioners' contentions and remand to the Board to grant their motion to reopen and to afford them an opportunity to fully substantiate their claims that deportation would

cause extreme hardship to themselves or their United States citizen children.

First, we hold that their motion to reopen was properly filed within the constraints set out in our earlier order of remand. *See Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 228 & n.4. While we agree that the motion apparently did not reach the party designated in 8 C.F.R. § 3.8 (1983) within the sixty-day period set forth in our decision, the record shows that the motion was received by other Board officials within that time period. A memorandum from the INS District Director in Omaha to the Board's national office on June 24, 1982, acknowledged that the motion had been mailed directly to the Board on May 7, 1982.[1] Thus, the Board received the motion within sixty days of our March 12, 1982, opinion, even though the precise officer designated in the regulations was not forwarded the motion until later. *See id.* § 3.8(b). We refuse to give this technical error in filing dispositive significance in a case of such importance to the petitioners and their family.

Next, we agree with the petitioners that the Board erred in denying the motion to reopen for want of a prima facie showing of the extreme hardship necessary to be eligible for section 1254(a)(1) relief. Normally, we review the Board's findings regarding a prima facie case of extreme hardship sufficient to merit reopening under an abuse of discretion standard. *See INS* v. *Wang*, 450 U.S. 139, 142, 144-145 (1981) (per curiam); *Diaz-Salazar* v. *INS*, 700 F.2d 1156, 1159-1160 (7th Cir.), *cert. denied*, 103 S. Ct. 3112 (1983); *Aiyadurai* v. *INS*, 683 F.2d 1195, 1199 (8th Cir. 1982). Where an issue has previously been decided on appeal, however, that decision binds a tribunal on remand as the law of

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[1] We assume that the reference to the Board in the text of this memorandum was to its regional office in Nebraska.

the case unless the decision was clearly erroneous or would result in a manifest injustice. *Otten* v. *Stonewall Insurance Co.*, 538 F.2d 210, 212-213 (8th Cir. 1976). The "law of the case" doctrine is equally applicable in instances of remand to administrative agencies and remand to lower courts. *City of Cleveland* v. *Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977). *See also Todd & Co.* v. *SEC*, 637 F.2d 154, 156-157 (3d Cir. 1980).

In the instant case, we concluded that the fulfillment of the seven-year continuous presence requirement pending our review merited remand for further proceedings on the petitioners' section 1254(a)(1) claims. *Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 227-228. Implicit in this conclusion was our decision that a prima facie case of extreme hardship, along with the other requirements of section 1254(a)(1), had already been established; thus, we remanded for prompt consideration and ruling on petitioners' "*claim*" for section 1254(a)(1) relief, not just for extra time to file a motion to reopen in the normal course. *Id.* at 228 (emphasis added).[2] The Fifth Circuit case cited in support of our remand was likewise one in which the court found a prima facie case meriting full consideration on remand. *Vargas-Gonzalez* v. *INS*, *supra*, 647 F.2d at 459 & n.4. Therefore, our holding of prima facie eligibility for a section 1254(a)(1) suspension

[2] We realize that in the closing footnote to our previous opinion, we stated that the Board should give "careful and thorough consideration to the new motion to reopen." *Rios-Pineda* v. *United States Department of Justice*, 673 F.2d 225, 228 n.5 (8th Cir. 1982). Although this language could be read in isolation to indicate that the Board was free to make an independent ruling regarding the prima facie case issue on remand, the language of the text indicated equally strongly that we had made final disposition of that issue. In fairness to the petitioners, we resolve whatever ambiguity we created in footnote 5 of our earlier decision in their favor.

was the law of the instant case, not challenged by the Board before this Court en banc or on certiorari to the Supreme Court.

As we view this holding today, we conclude that it is not clearly erroneous. The only prima facie factor which conceivably could have been decided against the petitioners after the seven-year continuous presence requirement was met would be the extreme hardship to the petitioners or their United States citizen children. The record of this case in 1982 clearly established that Bernardo had been regularly employed by Union Packing Company since 1974, and that the petitioners had made a substantial down payment on a home. Additionally, the petitioners' citizen children had lived in the United States since birth. These facts are reinforced by the exhibits filed by the petitioners on remand after our 1982 decision. And importantly, neither the immigration judge nor the Board questioned any element of prima facie eligibility, besides the seven-year prerequisite, before our 1982 opinion. These circumstances are sufficient to support our previous holding of prima facie eligibility. Furthermore, we find no manifest injustice to the Board in affirming this holding as the law of the case, if indeed any such injustice could be experienced by an agency of the government.[3]

[3] Even were we to hold that the petitioners' prima facie eligibility for suspension of deportation was not a matter previously decided by this Court, we would find that the Board abused its discretion in declining to find the requisite extreme hardship to merit reopening the deportation proceedings herein. A careful examination of the exhibits filed with the petitioners' motion to reopen reveals that for several years, Bernardo claimed his mother in Mexico, Guadalupe Pineda, as a dependent on his United States federal income tax returns. The burden placed on the petitioners by deporting them in the face of such family ties and responsibilities has never been considered by the Board. In addition, the motion to reopen indicates that the petitioners' United States-born children may only speak English, increasing

Finally, we must address the Board's exercise of discretion over and above the establishment of a prima facie case of eligibility, an issue which we did not consider in our prior decision. The Ninth Circuit has held that once a prima facie case of eligibility under section 1254(a)(1) is established, the Board abuses its discretion in refusing to reopen and grant a hearing on the matter. *Villena* v. *INS*, 622 F.2d 1352, 1361 n.12 (9th Cir. 1980); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 593 (9th Cir. 1978). Decisions by other courts intimate, however, that the Board may exercise the Attorney General's discretion, reflected both in statute and regulations, to deny a motion to reopen even after the petitioner has established a prima facie case of eligibility. *See INS* v. *Wang*, *supra*, 450 U.S. at 143 n.5; *LeBlanc* v. *INS*, 715 F.2d 685, 692 (1st Cir. 1983); *Moore* v. *INS*, 715 F.2d 13, 16 n.2 (1st Cir. 1983). Even assuming that the latter approach is correct and applicable to a motion to reopen on remand from an appellate court, we cannot accept the reasons given by the Board to

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their educational and social hardship should they be forced to go to Mexico with their parents, especially in the case of Ana Belia who has completed several years of education in Omaha. The Board's decision on remand from this Court failed to consider these specific factors, alone or in the aggregate with others in the record, as relevant to a prima facie showing of extreme hardship. Such disregard is an abuse of discretion. *See Batoon* v. *INS*, 707 F.2d 399, 401-402 (9th Cir. 1983); *Antoine-Dorcelli* v. *INS*, 703 F.2d 19, 20-21 (1st Cir. 1983); *Ramos* v. *INS*, 695 F.2d 181, 186 & n.12, 188 (5th Cir. 1983); *Santana-Figueroa* v. *INS*, 644 F.2d 1354, 1356 (9th Cir. 1981).

Furthermore, several courts have recognized the difficulty in declaring no extreme hardship to an immigrant's United States citizen children without a hearing. *E.g.*, *Luna* v. *INS*, 709 F.2d 126, 128 (1st Cir. 1983); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 594 (9th Cir. 1978). We agree with these courts and consider this an important factor in reviewing any denial of a motion to reopen in which extreme hardship to United States citizen children is alleged and supported by evidence.

support its denial of the petitioners' motion to reopen "in the exercise of discretion."

The Board first held that the petitioners prolonged their presence in this country, thus meeting the seven-year requirement of section 1254(a)(1), by filing "frivolous appeals." While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, *see LeBlanc* v. *INS*, *supra*, 715 F.2d at 693, the appeals and petitions for review in this case do not fall into the "frivolous" category. Indeed, this Court has now twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the petitioners' claim of their right to stay in this country. The other discretionary factor considered by the Board in denying the motion to reopen was the petitioners' "disregard" of our immigration laws by using a paid smuggler to illegally enter this country and refusing to depart voluntarily. Such "disregard" is necessarily present in some form in most deportation proceedings, however, and we find reliance on this factor to be "arbitrary, irrational, [and] contrary to the law." *Batoon* v. *INS*, 707 F.2d 399, 401 (9th Cir. 1983) (citation omitted). Consideration of these improper and irrelevant factors tainted the Board's exercise of discretion and is therefore grounds to reverse the denial to reopen the petitioners' case. *See Chung* v. *United States INS*, 602 F.2d 608, 612 n.7 (3d Cir. 1979).

In short, we find that the Board abused the discretion which remained after our remand of this case by refusing to give the petitioners a full and fair opportunity to present their evidence of extreme hardship and failing to render a reasoned decision based upon that evidence. The Board was not free to reconsider the prima facie case issue, and it abused the Attorney General's discretion in denying the petitioners' motion regardless of their prima facie showing. We do not ques-

tion the Board's sincerity in attempting to implement the immigration policy which languishes in our federal statutes. We do require that policy be followed to the letter and in a spirit of total fairness to those persons who may be permanently exiled from our shores as a result of its implementation. We therefore remand to the Board with directions that it reopen the petitioners' deportation proceedings, with a full hearing before an immigration judge if requested, in order to make a reasoned determination of their eligibility for a section 1254(a)(1) suspension of deportation by virtue of the resultant extreme hardship to themselves or either of their daughters, Ana Belia or Brenda Lee.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

July 16, 1982

Files: A22 733 395—Omaha
A22 733 397

In re: BERNARDO *RIOS*-PINEDA
ESTARNILADA RAMOS DE *RIOS*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Roman de la Campa, Esquire
2219 Allan Street
Sioux City, Iowa 51103

ON BEHALF OF SERVICE:
Anthony Kieffer
Acting General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entry without inspection

APPLICATION: Motion to reopen

This case is before us on remand from a decision on the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the respondents 60 days in which to properly file a motion to reopen to apply for suspension of deportation. The respondents have submitted a motion to reopen. The motion will be denied and our order of May 30, 1980, will be reaffirmed.

In a decision dated December 12, 1978, the immigration judge found the respondents deportable on their own admissions to having entered without inspection on

May 1, 1974. He further refused to accept the male respondent's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both respondents' requests for voluntary departure in the exercise of discretion. An appeal from that decision was dismissed by the Board on May 30, 1980. The respondents filed a petition for review of our decision on July 16, 1980. The Court remanded the record because the respondents acquired 7 years of physical presence during the pendency of the appeal.

The male respondent is a 30-year-old native and citizen of Mexico. At deportation proceedings, he testified that he first entered the United States in the summer of 1972, but his suspension application states that his first entry was in June 1971. The record reflects that he left the United States in March 1974 pursuant to an administrative grant of voluntary departure and returned with the assistance of a smuggler on May 1, 1974. The female is a 33-year-old native and citizen of Mexico who entered the United States on May 1, 1974, with her husband. The respondents have two United States citizen children born November 8, 1974, and February 9, 1979.

According to the order of the Circuit Court, the respondents were granted 60 days from March 12, 1982, to file a proper motion to the Board in accordance with the controlling regulations which the Court noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8. Under the provisions of 8 C.F.R. 3.8(b), an alien must submit a motion to reopen in triplicate to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted so that one copy is available each for that officer, the officer who rendered the initial decision in the case, and the Board.

The record before us indicates that the respondents' motion papers were not properly filed with the District Director in Omaha until May 21, 1982, some 10 days after the expiration of the period granted by the Court. Although at the top of a typed motion, counsel has written "Submitted: by certified mail May 6, 1982," the motion is itself undated and the envelope in which it was mailed has not been included in the record. We are consequently unable to determine the actual date on which the motion was mailed. However, a memorandum from the Appellate Trial Attorney forwarding the respondents' motion, which was improperly filed with that office, to the District Director in Omaha is dated May 18, 1982.

Even assuming that the respondents' motion was mailed within the time permitted by the Court, it cannot be considered properly filed in a timely manner because it was not submitted to the District Director in Omaha as required by the regulations until May 21, 1982. We believe that the respondents' failure to properly file their motion to reopen within the period allowed is sufficient cause for denial of the motion.

Even were the motion properly filed, we would conclude that the respondents have not made a prima facie showing of extreme hardship to establish eligibility for suspension of deportation. The respondents' motion consists of their suspension application, copies of birth and marriage certificates, income tax returns, a letter of employment, a contract for the purchase of a home, and the typed motion of their attorney. The respondents have submitted no affidavits attesting to the extreme hardship they may suffer from deportation. The motion signed by their attorney refers only to the psychological hardship of the respondents resulting from their inability to enjoy the higher standard of living in this country, which they have acquired despite their "low skills and education," and to the hardship of their children in being deprived of their rights as citizens to be educated in American schools and to receive social assistance. Having considered the documents and the

vague allegations forwarded by counsel, we are not persuaded that they are sufficient to establish a prima facie showing of extreme hardship. *See Lee v. INS*, 550 F.2d 554 (9 Cir. 1977); *Matter of Reyes*, Interim Decision ____ (BIA June 30, 1982).

In any case, we believe that the motion should be denied in the exercise of discretion. At the time of the respondents' deportation hearing they had been continuously present in the United States for less than 5 years and had only one child. They were able to acquire 7 years of physical presence and the additional equity of their second child only by filing what we consider to be frivolous appeals. For example, the arguments forwarded in their appeal to the Board ranged from a claim that the male respondent was eligible for section 212(c) relief although he had never been a lawful permanent resident, to the assertion that the immigration judge's interrogation of the respondents violated their rights against self-incrimination, despite the fact that no objection had been raised below. In this regard, we would also note that the Circuit Court did not address the merits of the contentions forwarded in the petition to review, but stated that the Board could dismiss the appeal if the respondents failed to file a proper motion within the specified time. Where an alien's eligibility for relief from deportation has been acquired after a deportation order is in effect only by the filing of frivolous applications or appeals or by other evasive or dilatory actions, the denial of a motion to reopen has been considered appropriate. *See Men Keng Chang* v. *Jiugni*, 669 F.2d 275 (5 Cir. 1982); *Oum* v. *INS*, 613 F.2d 51 (4 Cir. 1980); *Hibbert* v. *INS*, 554 F.2d 17 (2 Cir. 1977); *Lee* v. *INS*, *supra*; *Matter of Reyes*, *supra*.

In denying the respondents' request for voluntary departure, the immigration judge noted that they both entered the United States with the assistance of a paid smuggler and that the male respondent was returning

after a forced absence of only 2 months. Prior to the male respondent's departure, he had been granted administrative voluntary departure which was extended once and he nevertheless failed to leave voluntarily.

Considering the facts that the respondents acquired their 7 years of physical presence and the additional factor of their second child more than 2 years after they were ordered deported and that they have evidenced their disregard for our immigration laws by paying a smuggler to help them avoid inspection and by failing to depart voluntarily, we believe that these adverse factors outweigh the equities which have been identified by the respondents in their motion. Accordingly, we do not believe that reopening of proceedings is warranted as a matter of discretion. The motion to reopen will be denied.

ORDER: The motion to reopen is denied and our decision ordering the respondents deported is reaffirmed.

/s/ DAVID L. MILHOLLAN
DAVID L. MILHOLLAN
Chairman

Board Member James P. Morris has abstained from consideration of this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1619

BERNARDO RIOS-PINEDA, A 22 733 395, HUSBAND, AND ESTARNILADA RAMOS DE RIOS, A 22 733 397, WIFE, PETITIONERS,

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICES, OMAHA, NEBRASKA, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION AND NATURALIZATION SERVICE.

Submitted: March 11, 1981
Filed: March 12, 1982

Before HEANEY, HENLEY and McMILLIAN, Circuit Judges.

HEANEY, Circuit Judge.

Bernardo Rios-Pineda and his wife, Estarnilada Ramos de Rios, seek review of the Board of Immigration Appeals' May 30, 1980, decision which held that: (1) Bernardo and Estarnilada are deportable under 8 U.S.C. § 1251(a)(2); (2) voluntary departure under 8 U.S.C. § 1254(e) is inappropriate; (3) Bernardo is ineligible for relief under 8 U.S.C. § 1182(c); and (4)

Bernardo is statutorily ineligible to be considered for suspension of deportation under 8 U.S.C. § 1254(a)(1). For the reasons set forth below, we reverse the Board of Immigration Appeals' decision and remand for further proceedings consistent with this opinion.

Bernardo Rios-Pineda and Estarnilada Ramos de Rios were married in Mexico in 1971. In the summer of 1972, Bernardo unlawfully entered the United States, but returned to Mexico sometime around March of 1974 after he was apprehended by Immigration and Naturalization Service (INS) officials in Chicago.[1]

On May 1, 1974, Bernardo and Estarnilada entered the United States without inspection at San Ysidro, California, and subsequently made their way to Omaha, Nebraska, where they have resided ever since. Bernardo has worked for the Union Packing Company in Omaha continuously since 1974 and Estarnilada has been a housewife.

At the time of the December 12, 1978, deportation hearing before an Immigration Judge, Bernardo was earning $6.40 an hour for his job at Union Packing.[2] The couple owned an autombile and were buying a home for which they had initially paid a $3,000 downpayment. Bernardo and Estarnilada are the parents of two daughters, both of whom were born in Omaha: Ana Belia, born on November 8, 1974; and Brenda Lee, born on February 9, 1979.

On October 24, 1978, separate show cause orders alleging deportability under Section 241(a)(2) of the Immigration and Nationality Act (8 U.S.C. § 1251(a)(2)),

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[1] Bernardo testified at his December 12, 1978, deportation hearing that he was allowed to leave the United States in 1974 and that no deportation hearing was conducted at that time.

[2] The record reveals that an application for a labor certificate for Bernardo was filed at the Nebraska Labor Department. Although the record is not clear, it appears that Union Packing Company filed the application on Bernardo's behalf.

were issued against Bernardo and Estarnilada. A joint deportation hearing was held before an Immigration Judge in Omaha on December 12, 1978. The Immigration Judge held, inter alia, that an application for suspension of deportation pursuant to 8 U.S.C. § 1254(a)(1)[3] could not be considered as a matter of law because Bernardo did not satisfy the requirement of seven years continuous presence in the United States. The Immigration Judge ordered both Bernardo and Estarnilada to be deported to Mexico.

On May 30, 1980, the Board of Immigration Appeals affirmed the Immigration Judge's decision and a timely petition for review was subsequently filed in this Court.

In *INS* v. *Jong Ha Wang*, 450 U.S. 139, 139-140 (1981) (per curiam), the Supreme Court stated that 8 U.S.C. § 1254(a)(1)

> provides that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) has been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." The Attorney General is authorized to delegate his powers under the Act, 8 U.S.C. § 1103, and his authority under § 244 has been delegated by regulation to specified authorities in the Immigration and Naturalization Service. 8 C.F.R. § 2.1 (1979). [Footnotes omitted.]

[3] 8 U.S.C. § 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

In *Vargas-Gonzalez* v. *INS*, 647 F.2d 457 (5th Cir. 1981), the Fifth Circuit reversed a deportation decision by the Board of Immigration Appeals and remanded the proceeding so that the Board could reconsider the petitioner's eligibility for suspension of deportation because the seven-year continuous presence requirement under § 1254(a)(1) had been established during the pendency of the appeal. *Id.* at 458-459. The Court observed that the petitioner, having met the seven-year continous presence requirement, established—via facts contained in the record—"a prima facie case entitling him upon proper procedural application to reopen the case for reconsideration of his application for suspension of deportation." *Id.* at 459.

We conclude that Bernardo and Estarnilada, like the petitioner in *Vargas-Gonzalez*, have "made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing. * * *" *Id.* We accordingly reverse the Board's decision and remand for further proceedings.

III

In remanding this cause to the Board for further proceedings, we direct the Board to hold this matter in abeyance for sixty days from the date of this decision. If Bernardo and Estarnilada file a proper motion to reopen[4] within the sixty-day period, the Board shall promptly consider and rule upon their claim that they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1).[5] If no motion to reopen is filed within sixty days, the Board may dismiss this matter.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[4] If a motion to reopen is filed, it should be in accordance with applicable INS regulations as described by the Supreme Court in *INS* v. *Jong Ha Wang*, 450 U.S. 139, 140-141 & n.3 (1981). *See* 8 C.F.R. §§ 3.2, 3.8 (1981).

[5] We caution the Board to give careful and thorough consideration to the new motion to reopen if, indeed, one is filed. *See, e.g., Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981) (per curiam).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

May 30, 1980

Files: A22 733 395 - Omaha
A22 733 397

In re: BERNADO *RIOS* PINEDA, and ESTARNILADA RAMOS DE *RIOS*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Roman de la Campa, Esquire
2219 Allan Street
Sioux City, Iowa 51103

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entry without inspection

APPLICATION: Termination

The respondents appeal from the decision of an immigration judge dated December 12, 1978, in which they were found deportable as charged and denied the privilege of voluntary departure. The appeal will be dismissed.

The respondents, husband and wife, are both natives and citizens of Mexico, who last entered the United States on or about May 1, 1974. On October 24, 1978, the Service issued an Order to Show Cause charging the respondents with deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as aliens who had entered without inspection.

At the deportation hearing, the respondents, represented by counsel, admitted the factual allegations of the Order to Show Cause and conceded deportability under section 241(a)(2) of the Act. The immigration judge denied the male respondent's request for suspension of deportation upon finding that he had not met the seven year continuous physical presence requirement of section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). In addition, the immigration judge denied the male respondent's request for voluntary departure in light of his entry with the aid of a smuggler, the fact that he had previously been permitted to leave the United States without the issuance of an Order to Show Cause and had re-entered illegally two months thereafter and his apparent hesitancy to voluntarily depart from this country. Although the immigration judge did not find the same number of adverse factors present in the female respondent's case, he denied her voluntary departure as a matter of discretion in order to preserve the family unit.

On appeal, counsel for the respondent argues that the deportation of the respondents violates the constitutional rights of their minor United States citizen child. In addition, it is maintained that the male respondent is eligible for relief from deportation under section 212(c) of the Act, 8 U.S.C. 1182(c) since he has continuously resided in the United States for a seven year period. Furthermore, it is contended that the proceedings should be terminated since the respondent's employer has filed for a labor certificate on his behalf. Finally, counsel for the respondent argues that the immigration judge's interrogation of the respondents at the hearing violated their rights against self-incrimination under the fifth amendment of the United States Constitution.

Counsel's contention that the deportation of the respondents amounts to an unconstitutional deportation of their United States citizen child is without merit. Al-

though it has been recognized that the deportation of alien parents may result in the de facto deportation of minor citizen children, such deportation has not been viewed as violating any constitutional rights of such children. *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9 Cir. 1977); *Faustino* v. *INS*, 432 F.2d 429 (2 Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3 Cir. 1977); *Aalund* v. *Marshall*, 461 F.2d 710 (5 Cir. 1972). Alien parents who have violated the immigration laws cannot gain favored status, directly or vicariously, through their citizen children over those aliens complying with the immigration laws. *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5 Cir. 1975).

Counsel's contention that the male respondent is eligible for section 212(c) relief is also without merit. Relief under section 212(c) of the Act is specifically limited to those "aliens lawfully admitted for permanent residence" in the United States. The respondent here entered the United States without inspection and has never been admitted to this country as a lawful permanent resident. Consequently, he is ineligible for relief under section 212(c) of the Act.

It is further maintained that the deportation proceedings should be terminated against the male respondent since the Order to Show Cause was issued while a labor certificate application filed on his behalf was pending at the Nebraska Labor Department. However, it is within the prosecutorial discretion of the District Director whether to institute deportation proceedings against a deportable alien. Where deportation proceedings have commenced, neither the immigration judge nor this Board has jurisdiction to review the District Director's decision to prosecute by instituting deportation proceedings. *See Matter of Merced*, 14 I&N Dec. 644 (BIA 1974); *Matter of Geronimo*, 13 I&N Dec. 680 (BIA 1971).

Finally, counsel's argument that the immigration judge violated the respondents' fifth amendment rights against self-incrimination by forcing them to answer questions posed to them is also without merit. Since the respondents have been charged with entry without inspection, a federal criminal offense under section 275 of the Act, 8 U.S.C. 1325, they could have refused to answer, on fifth amendment grounds, any questions which they reasonably believed had a tendency to incriminate them. *Matter of Carrillo*, Interim Decision 2717 (BIA 1979); *Matter of R*, 4 I&N Dec 720 (BIA 1952). However, counsel did not object to any of the questions at the time of the hearing, and no evidence in support of a coercion claim has been submitted on appeal. There is nothing in the transcript of the deportation hearing indicating that the respondents' admissions were induced by coercion, duress, or improper action on the part of the immigration judge. *See Cuevas-Ortega* v. *INS*, 588 F.2d 1274 (9 Cir. 1979). To the contrary, counsel for the respondents plead to the factual allegations of the Order to Show Cause on the respondents' behalf and freely admitted those allegations and conceded to the deportability of the respondents. In fact, counsel also waived the reading to the respondents of the rights provided them under 8 C.F.R. 242.16. In light of the foregoing, we conclude that the respondents were not deprived of their rights against self-incrimination and the appeal, accordingly, will be dismissed.

ORDER: The appeal is dismissed.

/S/ DAVID L. MILHOLLAN

DAVID L. MILHOLLAN
Chairman

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION COURT

August 29, 1980
[Amending decision of December 12, 1978]

Files: A22 733 395-Omaha
A22 733 397-Omaha

In the Matter of

BERNARDO RIOS-PINEDA

AND

ESTARNILADA RAMOS DE RIOS, RESPONDENTS

IN DEPORTATION PROCEEDINGS

CHARGE: I&N Act, Section 241(a)(2), entry without inspection
LODGE: None
APPLICATION: Termination voluntary departure for the male respondent
Termination voluntary departure for the female respondent

IN BEHALF OF RESPONDENT:
Roman de la Campa
2219 Allan Street
Sioux City, IA 51103

IN BEHALF OF SERVICE:
Anthony Kieffer
Acting Trial Attorney
Omaha, Nebraska

DECISION OF THE IMMIGRATION JUDGE

The record relates to a man and wife, both natives and citizens of Mexico, who are charged with entering the United States without inspection.

The male respondent is a 27 year old, married male alien, a native and citizen of Mexico who entered the United States at or near San Ysidro, California, on about May 1, 1974, without being inspected. On Octo-

ber 24, 1978, an Order to Show Cause issued against the male respondent, alleging alienage, the above entry information, and further alleging that at the time of the entry he was not inspected by the United States Immigration Officer.

The Order to Show Cause charges deportability under provision of Section 241(a)(2) of the Immigration and Nationality Act, in that, respondent did enter the United States without inspection.

The female alien is a 29 year old, married, female alien, native and citizen of Mexico, who is charged with entering the United States at or near San Ysidro, California, on about May 1, 1974.

On October 24, 1978, an Order to Show Cause issued against her alleging alienage the above entry information, and further alleging that at the time of the entry she was not inspected by a United States Immigration Officer. The Order to Show Cause charges deportability under Section 241(a)(2) of the Immigration and Nationality Act, in that respondent entered the United States without inspection.

At a joint deportation hearing held before me this day, each respondent through Counsel admitted the allegations and the charge in the Order to Show Cause thereby conceding deportability.

The respondents through Counsel made application for suspension of deportation alleging that the male respondent had been in the United States since 1972 and would be eligible for the relief of deportation. Also, further alleging that the Service was estopped from deporting the respondents, that the proceedings should be held in abeyance until Administrative relief was available to the respondents as the male respondent's employer had filed a labor certification in his behalf, also on the *Acosta decision*, a District Court Decision rendered by the United States District Court in New Jersey, reversed in *Acosta* vs. *Gaffney*, 558 F 2d 1153 (3

Cir-1977). The Attorney for the respondents alleging that as they are parents of a United States citizen (a daughter) the deportation of the respondents would result in a defacto deportation of the United States citizen child. The father testified that he would not leave the child in the United States, but would take the child with them. Testimony was alleged to indicate that the female respondent is expecting another child in January of 1979.

The application for Suspension of Deportation was not allowed as the evidence of record indicates that the male respondent is ineligible for such relief as a matter of law. Section 244(a)(1) of the Immigration and Nationality Act, lists eligibility requirements for such a relief, which is pertinent to this decision, that an alien must have a continuous physical presence of more than seven years to be eligible for such relief. Viewing the evidence most strongly in favor of such an application, it indicates that the respondent was first in the United States during the summer months of 1972. The hearing is being held in December 1978. It shows that the maximum residence or physical presence respondent has is approximately six and a half years in the United States—lacking is the statutory seven years requirement for such relief. Additionally, the respondent testified that in 1974 he was apprehended by the Immigration Officials in Chicago and allowed to leave the United States without a hearing such as he is having today. Decisions have held that such a forced departure from the United States breaks any continuity of physical presence. See *Matter of Barragan* 13 I&N, DEC. (BIA-1971)

Each of the respondents have made application for the privilege of voluntary departure in lieu of deportation under the provision of Section 244(e) of the Immigration and Nationality Act. Testimony in this connection was elicited to show that the male respondent

entered the United States, the last entry, with his wife, through the services of a professional smuggler—paying the smuggler $225.00 to assist him, and $225.00 to assist his wife enter the United States. He has testified that he was apprehended in the Omaha area by the Immigration Service prior to the present case, and thereafter, was allowed to extend his stay on two or three occasions. The last time he received an extension of his stay it was indicated to him that no further extension would be granted. He did not return to the Immigration Office for further extensions of stay. He did not depart within the period of time that was granted to him. Male respondent has testified he has worked for the Union Packing Company in Omaha earning $6.40 an hour for the last two years. The male resondent testified he and his wife recently purchased a home, and paid approximately $3,000.00 towards the purchase price of their home.

I find that voluntary departure in lieu of deportation is the only relief which the two respondents are eligible to receive. Favorable factors in the male respondents case are: the absence of any criminal record, being the father of a United States citizen child, and expecting another child which in all probability will be born in the United States and the equity he has in a house which he has recently bought. The unfavorable factors in the male respondents case are that he entered the United States through the services of a professional smuggler for he and his wife, also, that the respondent was apprehended by the Immigration Officials in the Omaha area and was given a period of time in which to leave the United States. He has this time extended, and when notified that he would not receive another extension he failed to come back to the Immigration Office and failed to depart the United States as required. Also, the respondent has been working in the United States for four and a half years earning approximately

the last two years, $6.40 an hour, displacing persons in the United States lawfully of such employment. Although the respondent professed at first that he would not leave the United States if granted voluntary departure on reflection he testified that he would leave. I find that the respondent is statutorily eligible for the relief of voluntary departure in lieu of deportation.

Based upon the admissions the respondent has made before me today, I find that deportability has been established in each case by clear, convincing and unequivocal evidence, which is the burden placed upon the Service by regulations, 8 CFR 242.14(a), which recites the rule laid down by the Supreme Court in *Woodby* vs. *INS*, 385 U.S. 276, 87 S. ct 483, 17 L Ed 2d 362 (1966). I find that the male respondent is statutorily ineligible for relief of Suspension of Deportation as he is lacking the requisite statutory period of continuous physical presence and because his physical presence was interrupted in 1974 when he was required to depart the United States by the Immigration Service. See *Matter of Barragan*, 13 I&N Dec 759 (1971).

The remaining question to be decided is whether voluntary departure in lieu of deportation shall be granted to the respondents in the exercise of discretion. As to the male respondent, balancing the favorable factors versus the adverse factors, I find that the adverse factors outweigh the favorable factors and in the exercise of discretion will deny his application for voluntary departure. As mentioned above I find that the favorable factors, are—the parent of a United States citizen child, lack of criminal record, and purchasing a home in the United States. Balancing against these favorable factors are the facts that each (male respondent and female respondent) paid a smuggler to enter the United States, male respondent has been in the United States working earning $6.40 per hour for the past two years displacing a person that is lawfully in the United States

of such employment, that he was given an opportunity to leave the United States without issuance of an Order to Show Cause but failed to leave the United States, and when, in 1974, allowed to leave the United States without the issuance of an Order to Show Cause remained in Mexico approximately two months when he again entered the United States illegally. As the unfavorable factors outweigh the favorable factors, I will deny his application in the exercise of discretion and order his deportation from the United States. In the *Matter of Arde*, 13 I&N Dec 494 (BIA-1970).

The female respondent's testimony indicates she also had the use of a professional smuggler to enter the United States. The record is absent the other adverse factors present in the male respondent's case. However, in order to maintain the integrity of the family and because the use of a professional smugler is not to be rewarded, in the exercise of discretion, I will deny her application for voluntary departure in lieu of deportation.

Each of the respondents has chosen to be sent to Mexico if deported from the United States and I have so directed deportation to Mexico if ordered deported.

ORDER: IT IS ORDERED that in accordance with the above decision that both respondents be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

/S/ JESSE M. SELLERS
JESSE M. SELLERS
Immigration Judge

August 29, 1980
Date

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SEPTEMBER TERM, 1983

No. 82-1894

BERNARDO RIOS/PINEDA, ET AL, PETITIONERS.

v.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

JUDGMENT

Petition for Review of an Order of the Immigration and Naturalization Service.

This cause came on to be submitted on petition for review of an order of the Immigration and Naturalization Service, administrative record, appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the decision of the Board be, and it is hereby, reversed and remanded in accordance with the opinion of this Court.

November 9, 1983

(See attached sheet for cost information.)

A TRUE COPY:

ATTEST: Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit
1/24/84

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SEPTEMBER TERM, 1983

No. 82-1894

BERNARDO RIOS/PINEDA, ET AL., PETITIONERS,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT

PETITION FOR REVIEW OF ORDER OF IMMIGRATION AND NATURALIZATION SERVICE

The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 13, 1984